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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 323

ROY FELLOM, JR., LEONIE H. FELLOM, NEAL A. FELLOM,
Plaintiffs and Appellants,

vs.

REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, JOSEPH L. ALIOTO, Chairman, CITY AND COUNTY OF SAN FRANCISCO, DOE ONE, DOE TWO,
Defendants and Appellees.

Appeal from the District Court of Appeal, First Appellate District, Division One, State of California.

APPELLEES' MOTION TO DISMISS OR AFFIRM.

DION R. HOLM,
City Attorney of the City and County of San Francisco,
GEORGE E. BAGLIN,
Deputy City Attorney of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,
Attorneys for Defendants and Appellees.

MORLEY GOLDBERG,
Deputy City Attorney of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,
Of Counsel.

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REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, JOSEPH L. ALIOTO, Chairman, CITY AND COUNTY OF SAN FRANCISCO, DOE ONE, DOE TWO,
Defendants and Appellees.

Appeal from the District Court of Appeal, First Appellate District, Division One, State of California.

APPELLEES' MOTION TO DISMISS OR AFFIRM.

Appellees move that this appeal be dismissed or, in the alternative, that the judgment (157 A.C.A. 257, 320 P.2d 884) be affirmed on the ground that the appeal does not present a substantial federal question. (Rule 16, 1, (b) (c), Rules of the Supreme Court of the United States.)

QUESTIONS PRESENTED.

1. Whether the judgment of the District Court of Appeal that appellants' remedy is not to enjoin the Redevelopment Agency from prosecuting its eminent domain action, but to litigate their defenses in that action, presents a federal question.

2. Whether construction of the California Community Redevelopment Law (Calif. Health & Safety Code §§33000-33954) is a federal question.

3. Whether constitutionality of the California Community Redevelopment Law as applied to the Diamond Heights Redevelopment Project presents a substantial federal question in view of the decision in *Redevelopment Agency v. Hayes,* 122 C.A. 2d 777, cert. den. in 348 U.S. 987, that it is constitutional as so applied.

STATEMENT OF THE CASE.

Appellants are owners of three unimproved parcels of land in the Diamond Heights Redevelopment Project. Alleging that the Redevelopment Agency contemplated bringing an eminent domain action to acquire their land, appellants filed suit against the Agency in the superior court in San Francisco to enjoin it from commencing such action on the ground they would have a valid defense of discrimination thereto in that the Agency had refused to allow them as well as practically all other owners of unimproved land to participate in the redevelopment plan, while allowing most owners of improved land to do so, thereby

violating section 33701 of the California Health and Safety Code and denying appellants due process and equal protection of the law. Appellants alleged "that participation has been denied to about 97 per cent of the total privately owned, unimproved property, by acreage, while eligibility to participate has been granted to the owners of approximately 75 per cent of the improved property, by acreage, within the area." (157 A.C.A. at p. 259.)

Appellants also alleged that the California Community Redevelopment Law as applied to the Diamond Heights Redevelopment Project violated the Due Process Clause of the 14th Amendment in that the project area is not blighted within the meaning of the law.

The superior court sustained the Agency's demurrer to appellants' complaint and gave judgment for the Agency.

The District Court of Appeal affirmed. (157 A.C.A. 257, 320 P. 2d 884.) It held, as a matter of statutory construction, that the California Legislature in enacting the California Community Redevelopment Law intended to empower the Agency and the Board of Supervisors to provide for participation by none, all, or only part of the owners. (157 A.C.A. at pp. 263-265.) It also held that the distinction drawn by the Agency between improved and unimproved property was recognized in the California Community Redevelopment Law (California Health and Safety Code §33275; also §33013) and "appears to be reasonable and supportable." (157 A.C.A. at pp. 264-265.)

The District Court of Appeal further held that the Agency's power to grant participation to only part of the owners "of course imposes upon the agency a duty of reasonableness and good faith," and that the Agency must act "fairly and without discrimination" (157 A.C.A. at p. 264), but that appellants should raise their defense of discrimination and other defenses in the eminent domain action, not by an injunction suit. Said the court:

> "Furthermore, it appears here that by attempting to enjoin a threatened legal action the appellants have, in fact, mistaken their remedy. All of the grounds which they urge upon this court for a reversal of the judgment of the court below are grounds which may be urged as affirmative defenses in the eminent domain proceedings which are pending in the court below. Under such facts the judgment appealed from is affirmed." (157 A.C.A. at p. 265.)

The District Court of Appeal rejected appellants' contention that the California Community Redevelopment Law is unconstitutional as applied to vacant land in the Diamond Heights Redevelopment Project, pointing out that the case of *Redevelopment Agency v. Hayes,* 122 C.A. 2d 777, in which certiorari was denied (348 U.S. 987), "held that the Redevelopment Law is not unconstitutional as applied to nonslum-type 'blighted' areas or to undeveloped vacant land areas so designated, specifically the Diamond Heights area." (157 A.C.A. at p. 261.) The District Court of Appeal also cited *Berman v. Parker,* 348 U.S. 26, which case, sustaining the Federal Redevelopment

Law applicable to the District of Columbia, held that, in the area of redevelopment, Congress and its agencies could take into consideration a wide variety of values, aesthetic as well as monetary, and that the police power is not delimited by the concepts of public safety, health and morality. (348 U.S. at pp. 32, 33.)

ARGUMENT.

1. THE HOLDING THAT APPELLANTS HAVE AN ADEQUATE REMEDY AT LAW PRESENTS NO FEDERAL QUESTION.

The holding of the District Court of Appeal that appellants, in seeking an injunction instead of setting up their defense of unlawful discrimination in the eminent domain action, had mistaken their remedy, does not present a federal question. It is well settled that the prosecution of an action at law will not be enjoined by a court of equity because the plaintiff claims he will have a good defense to the law action.

> *Georgia v. City of Chattanooga,* 264 U.S. 472, 483-484 [suit to enjoin prosecution of eminent domain action dismissed; Court states: ". . . suits in equity will not be sustained in any case where a plain, adequate and complete remedy may be had at law. . . ."];
>
> *Porto Rico Tel. Co. v. Puerto Rico Communications Authority,* 189 F. 2d 39, 41, affirming 89 F. Supp. 922, cert. den. 342 U.S. 830 [suit to enjoin prosecution of eminent domain action; defendant judgment affirmed];

Robinette v. Chicago Land Clearance Commission, 115 F. Supp. 669, 672 (motion for leave to file petition for writ of mandamus denied in 342 U.S. 940);

Colorado Central Power Co. v. City of Englewood, 89 F. 2d 233, 235;

Nichols on Eminent Domain, 3rd ed., vol. 6, §28.22(1), p. 382;

Taliaferro v. Industrial Ind. Co., 131 C.A. 2d 120, 122 ["The prosecution of a cause of action at law will not be enjoined because the plaintiff seeking the injunction has a good defense to it where that defense may be interposed in the threatened action."];

Kredo v. Phelps, 145 Cal. 526, 527;

43 C.J.S. 481 ["Matters of defense of which complainant may avail himself in an action at law ordinarily cannot be made the ground of an injunction to restrain proceedings in such action."]

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2. CONSTRUCTION OF A STATE STATUTE IS NOT A FEDERAL QUESTION.

The District Court's construction of the California Community Redevelopment Law as empowering the Agency rather than the owners to determine whether all or only part of the owners should be allowed to participate in the development plan, provided it "acts fairly and without discrimination," with "reasonable-

ness and good faith," presents no federal question. The construction of a state statute is a matter of state, not federal law.

> *Watson v. Burk,* 313 U.S. 387, 401 ["The Florida Supreme Court . . . under our dual system of government has the last word on the construction and meaning of statutes of that state, . . ."];
>
> *Madden v. Kentucky,* 309 U.S. 83, 87 ["This interpretation of the state laws is of course accepted by us."];
>
> *St. Louis S.W. R. Co. v. Arkansas,* 235 U.S. 350, 362 ["Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort."];
>
> 35 C.J.S. 1247-48 [". . . where a state statute has been construed by the highest judicial tribunal of a state, such construction is regarded as part of the statute and is as binding on the federal courts as the text of the statute itself."].

Apropos the holding of the District Court of Appeal that the statute gave the Agency power to permit only part of the owners to participate, in *Berman v. Parker,* 348 U.S. 26, 33-34, it was held that "the means of executing the project are for Congress and Congress alone to determine," and this "disposes of any contention concerning the fact that certain property owners in that area may be permitted to repurchase their properties for redevelopment in harmony

with the over-all plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose."

In *Kaskel v. Impelliteri,* 306 N.Y. 73, 115 N.E. 2d 659, 662, cert. den. in 347 U.S. 934, the court said:

> "However, the situation here actually displayed is one of those as to which the Legislature has authorized the city officials, including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts. If there were to be a trial here and the courts below should decide in favor of plaintiff, there would be effected a transfer of power from the appropriate public officials to the courts. The question is simply not a justiciable one."

Similarly it was said in *Berman v. Parker,* 348 U.S. 26, 35-36:

> "It is not . . . the function of the courts to sort and choose among the various parcels selected for condemnation." (348 U.S. at p. 36.)
>
> "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment pro-

> grams need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." (348 U.S. at p. 35.)

To like effect are ***Balsamo v. Providence Redevelopment Agency,*** ..... **R.I.** ....., **124 Atl. 2d 238, 240-241, and *Redevelopment Agency v. Hayes,* 122 C.A. 2d 777, 790.**

Appellants' argument that the participation provisions of the California Community Redevelopment Law are invalid because the Law sets forth no "primary standards" to govern the Agency and Board of Supervisors in determining the scope of participation was an afterthought first raised by appellants subsequent to rendition of the judgment below. Appellants defended their tardy presentation by stating: "Appellants believe that a new point that raises a possible unconstitutional result in an opinion is always in order." (Appellants' Petition for Hearing by the California Supreme Court, p. 11, lines 1 to 5.)

In their "Statement as to Jurisdiction," p. 11, appellants state that this belated contention "is the real issue for this Court's review."[1]

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[1]The claim of lack of "primary standards" is practically the sole basis of appellants' appeal to this Court. Thus appellants' Statement as to Jurisdiction says:

> "The District Court's opinion has raised the issue as to whether an unlimited and absolute discretion without primary standards . . . can be exercised by a Redevelopment Agency . . ." (p. 12)
>
> "Appellants objected to such a discretionary power in the Agency on the basis that it would leave the law without any primary standards to govern such discretion. (See Petition

This so-called "real issue" was therefore not timely or properly raised and does not present a federal question.

Mergenthaler Linotype Co. v. Davis, 251 U.S. 256, 258 ["But this point came too late, being first advanced below on the motion for rehearing."];

Godchaux Company v. Estopinal, 251 U.S. 179, 181;

Sayward v. Denny, 158 U.S. 180, 183;

Rule 16, 1, (b), Rules of the Supreme Court of the United States.

But the point is wholly without merit because the Legislature *has* established the primary standards which govern the Agency and Board of Supervisors in applying all of the provisions of the Law, including the participation provisions. These standards are:

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for Rehearing and Petition for Hearing before Supreme Court.)" (p. 17)

"This, then, is the real issue for this Court's review—whether such an absolute and unlimited discretion can be given to an administrative agency in conferring participation favors to some and not to others of the same class in a redevelopment project area." (p. 11)

"The Agency . . . claims complete and absolute discretion in conferring participation favors as they see fit." (p. 11)

"The District Court's opinion . . . vest[s] complete discretion in the Agency to grant or deny participation favors." (p. 12)

"An absolute, unregulated discretionary power is vested in an administrative body by state law . . ." (p. 5)

See, also, appellants' reference to:

"the naked and absolute discretion claimed by the Agency in conferring participation favors on some owners and not on others equally situated." (p. 4)

1. "The interests of the public peace, health, safety and welfare" (§ 33731 (a));[2]

2. "feasibility" (§ 33731 (b));

3. "economic soundness" (§33731 (b));

4. "best develop[ment] of the project area . . . [with] the least interference with the continued enjoyment of existing property rights" (§33732); and

5. "the continuance of existing buildings or uses whose demolition and rebuilding or change of use are not deemed essential to the redevelopment and rehabilitation of the area." (§§ 33013, 33275)

The code sections referred to, together with §§ 33700, 33711 and 33730, are quoted in the Appendix hereto. In applying these standards both the Agency and the Board of Supervisors held hearings and made investigations (§§ 33700, 33730, 33732) before making the findings required by §§ 33732 and 33733 and finally adopting, by ordinance, the plan as the official redevelopment plan for the project area. (§ 33733)

Appellants argue that "none of these Code sections mentions the word participation and hence cannot be primary standards." (Appellants' Statement as to Jurisdiction, pp. 17-18.) But this argument presents at most a question of statutory construction for the state courts, not a federal question.

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[2]All section references herein are to the California Health and Safety Code.

In *Redevelopment Agency v. Hayes,* 122 C.A. 2d 777, 806-807, cert. den. 348 U.S. 987, the contention that the standards established by the Legislature were inadequate, was made and rejected. Likewise in *Berman v. Parker,* 348 U.S. 26, 35.

In the court below appellants relied upon the participation provisions of the Redevelopment Law, evidently recognizing that their constitutional rights "are satisfied when they receive that just compensation which the Fifth Amendment enacts as the price of the taking." (*Berman v. Parker,* 348 U.S. 26, 36.) Appellants' effort now to assail (and at the same time to rely upon) the participation provisions, flouts not only the rule that the claimed federal question must have been timely raised in the state court, but as well the rule that "One cannot, in the same proceeding, both assail a statute and rely upon it." (*Buck v. Kuykendall,* 267 U.S. 307, 316; *Hurley v. Commission of Fisheries,* 257 U.S. 223, 225; *Amer. Distilling Co. v. State Bd of Equalization,* 144 C.A. 2d 457, 465.)

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3. CONSTITUTIONALITY OF THE CALIFORNIA COMMUNITY REDEVELOPMENT LAW AS APPLIED TO THE DIAMOND HEIGHTS REDEVELOPMENT PROJECT HAS PREVIOUSLY BEEN DETERMINED AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Appellants' contention that the California Community Redevelopment Law is unconstitutional as applied to vacant, nonslum-type blighted land in the

Diamond Heights Redevelopment Project is, as already noted, a point that has heretofore been litigated through the United States Supreme Court, and rejected. (*Redevelopment Agency v. Hayes*, 122 C.A. 2d 777, cert. den. 348 U.S. 987; cf. *Berman v. Parker*, 348 U.S. 26; *People v. City of Chicago*, 414 Ill. 600, 111 N.E. 2d 626.) The contention therefore presents no substantial federal question.

CONCLUSION.

Essentially appellants' contention is that the Agency unlawfully discriminated against them because, as permitted by the California Community Redevelopment Law, it let certain homeowners, the demolition of whose homes was not essential to the redevelopment, participate therein and did not allow appellants, whose unimproved land the Agency deemed essential thereto, to do so. The District Court of Appeal has held that appellants are free to set up in the eminent domain action this defense of discrimination as well as any other defenses they may have. The eminent domain action has been filed and appellants, in their answer thereto, have raised the defense of discrimination. That action has not come to trial.

For the reasons stated the appeal presents no substantial federal question.

Wherefore appellees pray that the appeal be dismissed, or, in the alternative, that the judgment be affirmed.

Dated, San Francisco, California,
September 20, 1958.

Respectfully submitted,

DION R. HOLM,
City Attorney of the City and County of San Francisco,
GEORGE E. BAGLIN,
Deputy City Attorney of the City and County of San Francisco,
Attorneys for Defendants and Appellees.

MORLEY GOLDBERG,
Deputy City Attorney of the City and County of San Francisco,
Of Counsel.

(Appendix Follows.)

Appendix

California Health & Safety Code, §§33700, 33711, 33730, 33731, 33732, 33733, 33013, and 33275 read:

"§33700. **Preparation by agency: Power to hold hearings: Other negotiations.** Each agency shall prepare or cause to be prepared, or adopt, a redevelopment plan for each project area and for that purpose may hold hearings and conduct examinations, investigations, and other negotiations."

"§33711. **Submission to legislative body.** Upon the formation or adoption of a redevelopment plan and its submission to the planning commission of the community, the agency shall submit it to the legislative body."

"§33730. **Matters to be considered by legislative body.** The legislative body shall consider the redevelopment plan of a project area submitted by the agency, any alternative plan submitted pursuant to this part, and all evidence and testimony for or against the adoption of the plans."

§33731. **Determination as to regularity, public peace, etc., economical soundness.** On the question of the adoption of any redevelopment plan, the legislative body shall determine:

"(a) Whether the plan would redevelop the area in conformity with this part and in the interests of the public peace, health, safety, and welfare.

(b) Whether the adoption and carrying out of the redevelopment plan is economically sound and feasible."

"§33732. **Alternative plans: Preference: Factors.** If alternative plans are submitted, the legislative body shall give preference to the plan which it deems will best redevelop the project area in conformity with the purposes and policy of this part and the master or general plan for the community and which requires the least interference with the continued enjoyment of existing property rights consistent with the purposes of this part."

"§33733. **Plan qualified for adoption: Ordinance: Majority.** If the legislative body determines that the redevelopment plan conforms to the master or general plan of the community, that it is economically sound and feasible, and that the carrying out of the plan would promote the public peace, health, safety, and welfare of the community and would effectuate the purposes and policy of this part, by ordinance adopted by a majority vote of all the members it may adopt the plan as the official redevelopment plan for the project area."

"§33013. **'Redevelopment': Continuance of certain existing buildings or uses.** 'Redevelopment' means the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation, or any combination of these, of all, or part of a redevelopment area, and the provision of such residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general

welfare, including recreational and other facilities incidental or appurtenant to them.

"It does not exclude the continuance of *existing buildings* or uses whose demolition and rebuilding or change of use are not deemed essential to the redevelopment and rehabilitation of the area. . . ."

"§33275. **Existing buildings to be continued on land: Owner's nonparticipation in redevelopment plan as justifying acquisition by agency.** Without the consent of the owner, an agency shall not acquire any real property on which *existing buildings* are to be continued on their present site and in their present form and use, unless they require alteration, improvement, modernization, or rehabilitation under the redevelopment plan and the owner fails or refuses to agree to participate in the redevelopment plan pursuant to Sections 33701 and 33745."